International Mergers and Acquisitions

MARCELO BOMBAU, MARCELO POZZETTI, ZEKE SOLOMON, ANDREW FINCH, KATRIEN VORLAT, MARCELO FREITAS PEREIRA, KEN OTTENBREIT, KRUTI PATEL, KAMAL SULTANPURI, MICHELE MARIO NASCIMBENE, CARLOS FREANER, FRANCISCO VELÁZQUEZ, LENNAERT POSCH, TORSTEN BOGEN, ROBIN WITTERING, MICHAEL COPELAND, FLORIAN S. JÖRG, MALCOLM LOMBERS, JOSH CAMMAKER, RACHEL WILSON AND JORGE ACEDO PRATO*

I. Argentina

Argentina's economy continues to expand at an impressive pace.[1] But the strong recovery is starting to put pressure on domestic prices, making inflation the primary concern going forward.[2] Restrictions have been placed, *inter alia*, on the transfer of funds abroad for the payment of capital or interest, profits, and dividends and the repatriation of capital,

* The section regarding Argentina was written by Marcelo Bombau, who is a Partner and Marcelo Pozzetti a señor asóciate with M. & M. Bomchil, Buenos Aires, Arg. Zeke Solomon and Andrew Finch, both Partners with Allens Arthur Robinson, Sydney, Austl. contributed the section concerning Australia. Katrien Vorlat prepared the section regarding Belgium; she is a Partner with Stibbe, Brussels, Belg. The section concerning developments in Brazil was authored by Marcelo Freitas Pereira, who is a Partner with Castro, Barros, Sobral, Gomes, Sao Paulo, Braz. Ken Ottenbreit and Kruti Patel prepared the section on Canada; Mr. Ottenbreit is head of the New York office of Stikeman Elliot LLP, where Ms. Patel is an associate. The section on developments in India was prepared by Kamal Sultanpuri, an associate with Fox Mandal Little, New Delhi, India. Michele Mario Nascimbene, an associate with Cleary Gottlieb Steen & Hamilton LLC, Milan, Italy, authored the section regarding Italy. Carlos Freaner authored the section concerning developments in Mexico; he is an associate and Francisco Velázquez a Senior Partner with Goodrich, Riquelme y Asoc., Mexico City, Mex. The section regarding The Netherlands was prepared by Lennaert Posch is a Partner with Stibbe, New York, N.Y. Dr. Torsten Bogen, who is with Gleiss Lutz Pietrzak Siekieizynski Sp.k., Warsaw, Pol., authored the section on developments in Poland. The section regarding Russia was prepared by Robin Wittering (Partner) and Michael Copeland (Associate), both of Herbert Smith CIS LLP, Moscow, Russia. Dr. Florian S. Jörg, MCJ, an associate with Froriep Renggli, Zurich, Switz., prepared the section concerning Switzerland. Malcolm Lombers authored the section regarding developments in the United Kingdom; he is a Partner in the London office of Herbert Smith. Josh Cammaker (Partner) and Rachel Wilson, who are both with the Wachtell, Lipton, Rosen & Katz, New York, N.Y., prepared the section on developments in the United States. The section regarding developments in Venezuela was authored by Jorge Acedo Prato, a Partner with Hoet Pelaez Castillo & Duque, Caracas, Venez.

1. See CENTRAL BANK OF ARGENTINA, MONETARY PROGRAM MONITORING, FOURTH QUARTER 2006 (2006), *available at http://www.bcra.gov.ar/pdfs/polmon/BMB1206.pdf.*

2. *Id.*

but the Central Bank has issued several rules relaxing restrictions imposed on payments abroad.[3]

During the first ten months of 2006, ninety-nine mergers and acquisitions (M&A) transactions were announced. In total, they add up to an approximate value of US$5.5 billion, exceeding the level registered during 2005. The largest transaction that took place this year was the acquisition-merger by Grupo Clarín and Fintech Advisory of Cablevisión and Multicanal (the country's largest cable TV operators)[4] and their acquisition of Teledigital. The transaction included other companies for an estimated US$1.1 billion.[5] This transaction is awaiting antitrust clearance. The second most important agreement this year was Viceroy's sale to the Canadian company Yamana Gold for US$515 million.[6]

II. Australia

The Australian M&A market has been very strong in 2006, to a large extent fueled by a boom in private equity activity.[7] The retail and energy sectors have been the largest source of M&A work to date. The unsuccessful US$13.7 billion proposal to acquire Coles Myer by a private equity consortium lead by Kohlberg Kravis Roberts & Co. was perhaps the highest profile of this year,[8] though the US$6.08 billion merger of Suncorp Group, Australia's sixth largest bank, with insurance group Promina was just one example of the very robust market.[9]

A number of regulatory developments, outlined below, occurred during this year and have established an interesting legal environment for the future.

A. Takeovers Panel

The year 2006 has seen a major setback for the operation of the Takeovers Panel (the Panel), with considerable doubt raised about its jurisdiction to conduct reviews of takeovers. In response, the Australian Government has recently proposed a bill addressing these concerns that, if passed, should largely restore the Panel's effective operations.[10]

3. The changes and current regulations are summarized in a Central Bank of Argentina press release. *See* Press Release No. 48712, Central Bank of Argentina, Foreign Trade and Exchange Regulations in Force (Jan. 31, 2007), *available at* http://www.bcra.gov.ar/pdfs/resumencambios/ultimocomunicado2007i.pdf.

4. Charles Newbery, *Argentine Cablers Merge: Fintech, Clarin Create Bigger Platform*, VARIETY, Sept. 28, 2006, http://www.variety.com/article/VR1117950888.html?categoryid=1447&cs=1&query=fintech.

5. *Id.*

6. Press Release, Yamana Gold, Inc., Yamana to Acquire Viceroy, Solidifying its Position as Leading Intermediate Gold Producer (Aug. 16, 2006), *available at* http://www.yamana.com/News/PressReleases/2006/YamanatoAcquireViceroySolidifyingitsPositionasLeadingIntermediateGoldProducer/default.aspx.

7. *See* Michael Smith, *Analysis—Australia M&A Wave Builds as Buyout Firms Circle*, REUTERS, Jan. 22, 2007, http://today.reuters.com/news/articlebusiness.aspx?type=BankingFinancial&storyID=NSYD270579&from=Business.

8. Raphael Minder & Sundeep Tucker, *Coles rejects KKR consortium's ADollars 17bn bid*, FIN. TIMES, at 26, Sept. 7, 2006, *available at* http://www.ft.com/cms/s/4e2c779e-3d78-11db-bd60-0000779e2340.html.

9. Paul Daniel, *Australia's Competition Regulator Clears 20 bln aud Suncorp/Promina Merger*, FINANZNACHTRICHTEN, Dec. 20, 2006, *available at* http://www.finanznachrichten.de/nachrichten-2006-12/artikel-7484982.asp.

10. Corporations Amendment (Takeovers) Bill, 2006 (Draft) (Austl.), *available at* http://www.treasury.gov.au/documents/1152/PDF/Corporations_Amendment_(Takeovers)_Bill_2006.pdf. An explanatory document for the draft legislation has also been issued. *See* TREASURY OF AUSTRALIA, CORPORATIONS AMENDMENT

The Panel is an administrative body that acts as the primary forum for resolving disputes about a takeover bid until the bid period has ended.[11] The Panel is empowered to make a declaration of "unacceptable circumstances" when circumstances in relation to the affairs of a company are unacceptable because of the effect on the control of the target or the acquisition of a substantial interest in the company or because there has been a breach of the takeover provisions of the Corporations Act 2001.[12]

In 2005, we reported that the Panel had been defeated in a judicial review of its finding of unacceptable circumstances regarding the lack of disclosure by Swiss commodities company Glencore of its use of cash-settled equity swaps to block the Centennial Coal Co. bid for Austral Coal Ltd.[13] The current proposed amendment would ease the current qualification on the Panel's ability to make unacceptable circumstances declarations in the takeover context.[14]

B. Changes to Media Ownership Laws

In October 2006, the Australian Parliament passed new media reforms to take effect in 2007.[15] Key changes introduced by the new reforms are the relaxation of cross-media ownership restrictions and abolition of foreign ownership restrictions, subject to separate requirements for Treasurer approval contained in the Foreign Acquisitions and Takeovers Act 1974.

C. ACCC Merger Guidelines

The Australian Competition and Consumer Commission (the ACCC) is responsible for enforcing the competition requirements of the Trade Practices Act 1974 in relation to proposed M&A transactions. In July 2006, the ACCC published new merger guidelines that settle the processes the ACCC will follow when considering confidential and non-confidential mergers.[16]

(Takeovers) Bill 2006—Explanation, http://www.treasury.gov.au/documents/1152/PDF/Explanatary_Material.pdf.

11. Corporations Act, 2001, c. 6, § 659AA (Austl.).

12. *Id.* § 657A.

13. Glencore Int'l AG v. Takeovers Panel (2005) 220 A.L.R. 495 (Austl.). *See also* Glencore Int'l AG v. Takeovers Panel (2006) 151 F.C.R. 77 (Austl.).

14. According to the Explanatory Document:

> Section 657D(2) [of the Corporations Act 2001] will be amended so that, where the Panel is satisfied the rights or interests of any person have been, are being, will be or are likely to be affected by unacceptable circumstances, then the Panel may make the orders it thinks appropriate to protect any rights or interests of that person. This will allow the Panel to address the effects of the unacceptable circumstances and protect the interests of those persons more effectively. Section 657D(2) will also be amended to ensure that the Panel may make orders which protect the interests of a group of persons whose interests have been affected, rather than imposing any requirement to address the effects person by person. Treasury of Australia, *supra* note 10, at 2.

15. Broadcasting Services Amendment (Media Ownership) Act, 2006 (Austl.); Broadcasting Legislation Amendment (Digital Television) Act, 2006 (Austl.); Communications Legislation Amendment (Enforcement Powers) Act, 2006 (Austl.).

16. ACCC, Merger Review Process Guidelines (2006), http://www.accc.gov.au/content/index.phtml/itemId/740765. The new guidelines supplement the Merger Guidelines 1999.

D. Responding to the Private Equity Approach

The boom in private equity has been a dominant theme in M&A activity in Australia in 2006.[17] General rules and features of private equity deals in Australia have developed and include: a high degree of leverage; bids made conditional on due diligence; and acquisition of 100 percent of target and target management and board co-operation. The rise of private equity consortia and their increased willingness to engage in large and hostile publicly listed company takeovers raises important issues for directors in responding to such bids, in announcing approaches when made, in allowing due diligence on a company's assets and business in a way not available to shareholders or the market generally, and in endorsing a proposal at a price in excess of recent trading prices.

III. Belgium

A. Significant Transactions

The Belgian M&A market was very active throughout 2006. Significant transactions included the sale of Quick,[18] Carestel,[19] Banksys/Bank Card Company,[20] StarParks Group,[21] and others. Especially in the waste sector, much activity has been recorded with the putting up for sale of Biffa NV,[22] Indaver NV,[23] and Van Gansewinkel.[24] The liberalization of the energy market fostered M&A activity in the field of oil and electricity.

B. Regulatory And Legislative Developments

1. *Abolition of Bearer Securities*

Belgium was one of the few countries in the world that allowed the issuance of bearer securities. The Act of December 14, 2005, now provides for the gradual abolition of

17. *See* Corporations Amendment (Takeovers) Bill, *supra* note 10.

18. Press Release, Quick Restaurants, S.A., Financière Gallop SAS Devient L'Actionnaire Majoritaire de Quick Restaurants SA (Jan. 22, 2007), *available at* http://www.quick.be/corporate/ftp/Press/FR/2201communique_de_presse_Fr.pdf.

19. Press Release, Carestel Group, Autogrill: Successful Closing of Carestel Cash Takeover Bid (Jan. 12, 2007), *available at* http://www.carestel.com/carestel/UserFiles/File/Press/carestel_risultati_opa_120107_uk.pdf.

20. Press Release, Atos Origin, Creating a European Leader in Payment Services: Atos Origin Acquisition of Banksys and BCC (July 20, 2006), *available at* http://www.atosorigin.com/en-us/Newsroom/en-us/Press_Releases/2006/2006_07_20_01.htm.

21. Press Release, Palamon Capital Partners, StarParks Group Sells Six Leisure Parks (May 30, 2006), available at http://www.palamon.com/press/index.php?read=22.

22. Press Release, Biffa Waste Servs., Biffa Belgium Announcement (May 12, 2006), http://www.biffa.co.uk/news.php?shownews=101.

23. *See* Indaver NV, 2005 Annual Report 19 (2006), http://www.indaver.com/fileadmin/indaver.be/pdfs/chapter3_JVS2005_E.pdf.

24. Press Release, Kohlberg Kravis Roberts & Co., KKR and CVC to Acquire Van Gansewinkel Creating a Leading Waste Management Company (Jan. 22, 2007), *available at* http://www.kkr.com/news/press_releases/2007/01-22-07.html.

bearer securities. In the future, securities may only be issued in registered or dematerialized form.[25]

The Act applies to all bearer securities issued by Belgian entities. But trade securities (bills of exchange and cheques), bonds, and debt securities exclusively traded abroad fall outside the scope of this Act.[26] Upon expiration of the respective transitional periods, all bearer securities that have not been previously converted shall be converted *ipso iure* into dematerialized securities and shall be registered on a securities account of the issuer.[27] If the holder has not presented himself to the issuer by January 1, 2015, the securities will be sold.[28]

2. *Legislative Proposals Regarding Public Takeover Bids*

The Belgian Banking Finance and Insurance Commission has prepared a first draft of the Act and Royal Decree, implementing the European Union (EU) Directive on takeover bids of April 21, 2004.[29] The draft legislation will bring about a few changes mainly on three levels: mandatory bids, protection mechanisms, and sell out rights.

C. Court Cases

In 2002-03, the Belgian legislature assigned the Brussels Court of Appeals exclusive jurisdiction over the decisions of the Banking Finance and Insurance Commission (BFIC) in regard to public bids.[30] The first decisions were rendered in 2005 and early 2006.

The Brussels Court of Appeals firmly reminded the BFIC that its competence is limited to assessing whether the prospectus provides the general public with sufficiently clear and correct information so as to make an informed decision on the offer. On the other hand, the Court made clear that the assessment of the prospectus pertains to the exclusive competence of the BFIC, impeding the Court to order that additional information should be made public after the BFIC has duly approved a prospectus.[31]

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25. Wet van 14 december 2005 houdende de afschaffing van effecten aan toonder/loi du 14 decembre 2005 portant la suppression des titres au porteur [Act of December 14, 2005, on the Abolition of Bearer Securities], Belgisch Staatsblad [Official Gazette of Belgium], Dec. 23, 2005 (errata published on Feb. 6, 2006). The Official Gazette of Belgium can be found online in three languages at http://www.ejustice.just.fgov.be/cgi/welcome.pl.

26. *Id.* at art. 2.

27. *Id.* at art. 9.

28. *Id.* at art. 11.

29. This draft is currently being discussed in the Belgian Parliament and, once approved, will be published in the Belgian Official Gazette. The status of the discussion can be followed on the website of the Belgian House of Representatives at http://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&langauge=nl&rightmenu=right&cfm=/site/wwcfm/flwb/flwbn.cfm?lang=N&legislat=51&dossierID=2834.

30. Wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten/Loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers [Act of August 2, 2002, on the supervision of the financial sector and on financial services], Belgisch Staatsblad [Official Gazette of Belgium], Sept. 4, 2002, arts. 120-24.

31. Hof van Beroep van Brussel [Court of Appeals of Brussels], Judgment of Nov. 8, 2006, 2006/2, TBH, at 238-41.

IV. Brazil

A. Provisional Measure No. 315

The Brazilian Government enacted Provisional Measure No. 315 on August 3, 2006, amending the rules applicable to currency exchange transactions and registration of foreign capital. These new rules simplify the procedures regarding currency exchange contracting, especially in connection with export transactions, allowing Brazilian domiciled export entities to maintain part of the income resulting from their export transactions abroad. Moreover, the term for exporters to repatriate the remaining 70 percent of the incomes originated from export operations has been raised from 210 to 360 days. The funds maintained abroad must be notified by the exporter to the Brazilian Revenue Service.

Another important modification refers to the regularization of foreign capital invested in legal entities in Brazil that were not registered nor subject to any type of registration at the Central Bank (known as contaminated capital). According to the new rules, such capital can be registered in Brazilian currency with the Central Bank. With such registration, this previously contaminated capital can now be remitted abroad in the form of dividends.

B. Brazilian Central Bank Ruling 3317

Brazilian Central Bank Ruling 3317 was enacted on March 29, 2006, to address M&A transactions involving the financial industry, regulating the formal requests to increase foreign participation in the capital of financial institutions.

V. Canada

A. Opportunities for International Investment in Canadian Income Funds

Over the past several years, income trusts and publicly-treated partnerships (income trusts) have been a very popular investment vehicle in the Canadian securities market. In 2006, there were significant developments regarding the tax treatment of income trusts that are expected to have an impact on M&A activity in Canada going forward.

Income trusts are flow-through entities for Canadian tax purposes, allowing them to avoid entity-level corporate taxes. On October 31, 2006, the Canadian Minister of Finance announced changes to the tax treatment of income trusts, resulting in the imposition of a corporate-type income tax at the entity level at a rate of approximately 31.5 percent.[32] Unit-holders receiving distributions from income trusts will, in turn, be considered to receive taxable dividends subject to the tax treatment generally afforded to such dividends.[33] Real estate investment trusts meeting certain criteria will be exempted from the new regime.[34]

32. *See* Press Release 2006-061, Dept. of Fin. Canada, Canada's New Government Announces Tax Fairness Plan (Oct. 13, 2006), *available at* http://www.fin.gc.ca/news06/06-061e.html.

33. *Id.*

34. *Id.*

The government's announcement had a prompt effect on the market. As a result of the announcement, a number of Canadian companies that had indicated previously that they would convert to income trusts withdrew their plans to do so.[35]

B. Issues Facing Income Trusts

Due to the higher cost of equity capital, income trusts may prefer to use less expensive debt capital. This new preference may lead existing income trusts to consider de-capitalizing themselves by borrowing from third party lenders and returning equity capital to their unit-holders. Their investors may demand this action to counter the value erosion created by the new tax regime that will become applicable to them.

C. Competitive Advantage of Private Equity Firms

The changes in the tax treatment of income trusts have created significant opportunities for U.S. and foreign private equity firms in particular.

VI. India

There was a significant level of activity in the areas of M&A and joint ventures in India in 2006.[36] In the first half of 2006, India witnessed a record number of M&A deals, collectively worth US$25.6 billion.[37] The key reason for this is a high level of market confidence. According to the Reserve Bank of India's (RBI) third-quarter review of the economy, the Indian economy continued to exhibit strong growth during the first two quarters of 2006-07.[38]

"The Government of India has recently [adopted] . . . a number of rationalisation measures . . . extending the automatic route to more sectors, and allowing FDI [Foreign Direct Investment] in new sectors."[39] "FDI under the automatic route does not require prior approval either by the Government of India or the Reserve Bank of India (RBI)."[40] "Investors are only required to notify the concerned Regional office of RBI."[41] Sectors such as television broadcasting, aviation, petroleum and natural gas, coal & lignite mining, and retail trade of single brand products have benefited due to these policies.[42]

35. On October 11, 2006, BCE, Inc., the holding company of Bell Canada, announced it would convert to an income trust. *See Bell Canada to Convert to Income Trust*, CBC News, http://www.cbc.ca/money/story/2006/10/11/bceincometrust.html (last visited Mar. 11, 2007). On December 12, 2006, however, BCE reversed its decision. *BCE Drops Plan for Income Trust Conversion*, CBC News, http://www.cbc.ca/money/story/2006/12/12/bcetrustconvert.html (last visited Mar. 3, 2007).

36. *See, e.g.*, *European Banks Race for India M&A Business*, Reuters, Jan. 30, 2007, http://www.financialexpress.com/latest_full_story.php?content_id=153185.

37. *Id.*

38. Reserve Bank of India, Macroeconomic and Monetary Developments: Third Quarter Review 2006-07 1 (2007), http://rbidocs.rbi.org.in/rdocs/Publications/PDFs/75542.pdf.

39. Gov't of India, Ministry of Commerce & Indus., Foreign Direct Investment Policy 1 (2006), http://dipp.nic.in/publications/fdi_policy_2006.pdf.

40. *Id.* at 6.

41. *Id.*

42. *See id.* § A.

The Government has also allowed under the automatic route transfer of shares from residents to non-residents in financial services. There have been notable amendments to the takeover regulations by the Securities and Exchange Board of India (SEBI) in 2006.[43]

The Ministry of Company Affairs has introduced some path-breaking changes for making Indian companies compliant with e-governance practices from September 16, 2006.[44] In addition, digital signatures have been made compulsory for directors, authorized signatories, and professionals, thus enhancing security.[45]

VII. Italy

A. Reform of Italian Corporate and Securities Laws: The Investor Protection Act

On December 28, 2005, the Italian Parliament adopted the Investor Protection Act, a set of rules aimed at, among other things: (i) enhancing the rights and protection of minority investors, the responsibility of corporate directors and officers, and the reliability of financial information of Italian-listed companies; and (ii) reforming the antitrust review process of mergers among banks.[46] The primary goal of this reform was to address certain issues and loopholes in the Italian legal system brought to light by scandals such as the Parmalat bankruptcy.

The Investor Protection Act requires listed companies to adopt cumulative voting systems for the election of directors, ensuring that at least one member of the board is elected from the slate presented by minority shareholders. Similarly, at least one statutory auditor of the company will have to be designated by minority shareholders.[47] Shareholders representing at least 2.5 percent of the capital stock of a listed company may add matters to the shareholders' meeting agenda.[48] Further, the Act requires Italian-listed companies to provide in their bylaws, effective from 2007, for the appointment of an officer responsible for the preparation of financial information (the Accounting Officer). The Accounting Officer and the company's *direttore generale* (COO) must certify the accuracy of financial information contained in any public document or statement of the company.[49]

Finally, the Act overhauled the internal organization of the Bank of Italy (including by replacing the Governor's life tenure with a six-year term of office) and transferred the

43. AsiaLaw.com, SEBI relaxes Takeover Regulations, http://www.asialaw.com/default.asp?page=14&ISS=22245&SID=642875 (last visited Mar. 3, 2007); SEBI, (Substantial Acquisition of Shares and Takeovers) Regulations 1997, http://www.sebi.gov.in/Index.jsp?contentDisp=department&dep_id=7 (last visited Mar. 3, 2007).

44. *See* Gov't of India, Ministry of Company Affairs, About Us, http://www.mca.gov.in/MinistryWebsite/dca/aboutus/aboutmca21.html (last visited Mar. 11, 2007).

45. *Id.*

46. Disposizioni per ta tutela del risparmio e la disciplina dei mercati finanziari [Investor Protection Act], Law No. 262, Dec. 28, 2005, Gazz. Uff. [Official Gazette of Italy] No. 301 (Dec. 28, 2005). The Official Gazette of Italy is available online in Italian at http://www.gazzettaufficiale.it/.

47. *See* Law on Financial Intermediation, Legislative Decree No. 58, Feb. 24, 1998, art. 148 (as amended by Article 2 of the Investor Protection Act) (Italy).

48. *See id.* at art. 126 (as amended by Article 5 of the Investor Protection Act).

49. *See id.* at art. 154 (as amended by Article 14 of the Investor Protection Act).

power to review bank mergers, for purposes of Italian antitrust rules, from the Bank of Italy to the Italian Antitrust Authority.[50]

VIII. Mexico

A. Legislative Developments

Amendments to the Federal Economic Competition Law (the Law), effective as of June 29, 2006, cover an array of topics.[51]

1. *General Provisions*

A broader concept of economic agent is provided, as it now expressly includes chambers of commerce, individuals, and legal entities that operate with or without commercial purposes.[52]

The amended Law clarifies that the state is not allowed to engage in monopolistic practices, even in those strategic areas in which the constitution allows the state to have complete control without them being considered monopolies.[53]

In addition, regarding the power of the Executive to fix the prices of those goods and services considered necessary for the national economy, the Federal Competition Commission (FCC) must first determine that there are "no conditions of effective competition in the relevant market" and issue an opinion regarding the specific price that the Ministry of Economy must set for that good or service.[54]

2. *Monopolies and Monopolistic Practices*

Prior to the amendments, the Law had a catch-all provision that was held unconstitutional by the Supreme Court in light of its ambiguity.[55] Therefore, the Law currently includes within the definition of relative monopolistic practices the following acts: predatory prices, exclusivity discounts, cross-subsidies, price discrimination, and the increase of costs or obstruction of the productive process or reduction of the competitors' demand.[56]

3. *Mergers, Acquisitions, and Takeovers (Concentrations)*

The FCC may consider new elements to determine if a concentration will be penalized: (i) the effects of the concentration in related markets; (ii) the participation of the economic agents involved in the concentration in other economic agents, and the participation of

50. Pursuant to the Act, the Italian Antitrust Authority and the Bank of Italy must issue a joint decision at the end of the merger review process. At the time of writing, it is understood that the joint decision system is under the review of the Italian Parliament.

51. Ley Federal de Competencia Economica [L.F.C.E.] [Competition Law], *as amended*, Diaro Oficial de la Federación [D.O.], 28 de Junio de 2006 (Mex.).

52. *Id.* at art. 3.

53. *Id.* at art. 4.

54. *Id.* at art. 7.

55. *Id.* at art. 10.

56. *Id.*

other economic agents in those involved in the concentration; and (iii) the accredited efficiency earnings.[57]

The amended Law establishes the thresholds under which a particular concentration must be notified to the FCC before it is carried out. These thresholds were increased by 50 percent, clarifying that both the direct and the indirect value of the transaction will be considered for this matter.[58]

4. *Authority of the Federal Competition Commission*

Under the amended Law, the FCC was granted the authority to make verification visitations with regard to information that had been previously requested by such body. For such visitations, it is required to obtain an authorization from the corresponding judicial authority.[59]

Another significant addition to the Law is the right of economic agents to cancel the investigation initiated by the FCC, provided—subject to certain conditions—that they commit to suspend or correct the conduct under investigation.[60]

A further noteworthy contribution to the amended Law is the establishment of a penalty reduction method for any economic agent that has engaged or is engaging in an absolute monopolistic practice and that acknowledges such conduct before the FCC.[61]

B. Major Concentrations Approved by the FCC

The most relevant M&A authorized in 2006 by the FCC were transactions involving: (i) Bayer, A.G. & Shering Aktiengesellschaft;[62] Nafta Fund of Mexico, L.P., Arancia Industrial, S.A. de C.V., and Pacific Star Holding, S.A. de C.V.;[63] (ii) Berkshire Hathaway, Inc. and Russell Corporation;[64] and (iii) Tenedores de Valores and Satélites Mexicanos, S.A. de C.V.[65]

IX. Netherlands

A. Increased Activity of Private Equity Investors and Hedge Funds

The year 2006 brought about discussions on the role of investment funds as investors and shareholders, particularly hedge funds and private equity funds. This was caused in

57. *Id.* at art. 18.
58. *Id.* at art. 20.
59. *Id.* at art. 31.
60. *Id.* at art. 33.
61. *Id.* at art. 33.
62. Comisión Federal Competencia, Resolución, CNT-82-2006 (Aug.10, 2006), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2405&Itemid=183.
63. Comisión Federal Competencia, Resolución, CNT-83-2006 (July 12, 2006), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2662&Itemid=183.
64. Comisión Federal Competencia, Resolución, CNT-87-2006 (Aug.3, 2006), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2406&Itemid=237.
65. Comisión Federal Competencia, Resolución, CNT-89-2006 (Aug.24, 2006), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2663&Itemid=183.

part by the acquisition of VNU N.V., a global information and media company, by a consortium of large private equity funds for 7.5 billion euros.[66]

Other significant deals also starring large private equity parties include Philips Semiconductors, a leading supplier of silicon system solutions, which was 80 percent taken over by a consortium of Kohlberg Kravis Roberts & Co. (KKR), Silver Lake Partners, Bain Capital, L.L.C., APAX, Partners Inc., and Alpinvest Partners N.V.[67] The transaction value was approximately 6.4 billion euros. Another notable deal was the sale of the logistics division of TNT N.V., a global provider of mail, express services, and logistics services.[68] Apollo Management, L.P., a large U.S. private equity firm, paid approximately 1.5 billion euros for the supply chain specialist.

B. Legal and Regulatory Developments

The two most significant legal developments in the M&A field are the (anticipated) implementation of the EU Directive on Takeover Bids (Takeovers Directive)[69] and the actual implementation of the EU Directive on Transparency (Transparency Directive).[70] The Takeovers Directive has not yet been fully implemented into Dutch law but some necessary temporary provisions have been made.[71] The full implementation is expected in the first half of 2007.

The Transparency Directive, on the other hand, has been fully implemented in a new Act on the disclosure of major holdings and capital interests in securities issuers.[72] The most significant changes consist of a wider scope of the Act, more notification requirements, and a periodic obligation to update notification and publication of notifications.

X. Poland

A. Significant Transactions and Market Trends

The year 2006 will be a record year for the M&A market in Poland.[73] It is estimated that the value of M&A in Poland in 2006 will reach US$ 20 billion, doubling the amount for 2005.[74]

66. Press Release, VNU N.V., VNU Agrees to Public Offer from Private Equity Group That Values Company at EUR 28.75 Per Common Share, or Approximately EUR 7.5 Billion in Cash (Mar. 8, 2006), *available at* http://www.nielsen.com/media/2006/pr_2006_0308_2.pdf.

67. Press Release, Philips, Philips to Sell Majority Stake in Semiconductors Business to Private Equity Consortium KKR, Silver Lake and Alpinvest (Aug. 3, 2006), *available at* http://www.philips.com.my/about/news/press/article-14610.html.

68. Press Release, TNT N.V., TNT Reaches Agreement to Sell its Logistics Division to Apollo Management, L.P. (Aug. 23, 2006), *available at* http://www.tntfreight.com/Images/Press%20release%20EN%20FINAL_tcm114-232114.doc.

69. Council Directive 2004/25/EC, 2004 O.J. (L 142) 12 [hereinafter Takeovers Directive].

70. Council Directive 2003/71/EC, 2003 O.J. (L 345) 64.

71. Tijdelijke vrijstellingsregeling overnamebiedingen [The Temporary Exemption Regulation for Public Offers], No. FM/2006/1209, May 15, 2006, Stcrt. 2006, 98 (Neth.).

72. *Wet melding zeggenschap en kapitaalbelang in effectenuitgevende instellingen 2006*, now part of *Wet op het financieel toezicht* [Act on Financial Supervision] that came into force on Jan. 1, 2007, Stb. 2006, 475 (Neth.).

73. L.Z., *M&A Market Grows*, Warsaw Voice News, Dec. 6, 2006, *available at* http://www.warsawvoice.pl/view/13207/.

74. *Id.*

The purchase by PKN Orlen (the major producer and marketer of petrochemicals in Poland) of the shares of the Lithuanian refinery, Mozejki, for US$2.34 billion will be a record takeover by a Polish firm.[75] It is also worth mentioning the transactions on the financial market, such as the merger of Bank Pekao S.A. with Bank BPH S.A.[76] (after the acquisition of HypoVereinsbank A.G.[77] and the takeover of Dominet Bank by Fortis Banque, S.A.).

B. Legal and Regulatory Developments

There were no significant changes in Polish M&A law in 2006.

XI. Russia

A. Significant Transactions

The natural resources sectors remain the principal focus for M&A activity in Russia. The largest M&A transaction completed in Russia in 2006 was the acquisition by Chinese state-owned oil company, Sinopec Corp., of TNK-BP Ltd.'s 96.9 percent interest in Udmurtneft, a mid-sized Russian oil production unit for US$ 3.5 billion.[78] Rosneft, the Russian state-owned oil major, was granted a call option for a 51 percent controlling interest in Udmurtneft, which it has stated that it intends to exercise.[79] This transaction illustrates that whilst the Russian oil market remains open to foreign investors, the Russian government intends to retain involvement through state-owned oil majors.

The metals sector saw much activity during 2006. Rosoboronexport, the state-controlled arms exporter, acquired a majority holding in VSMPO-AVISMA, a major titanium producer which accounts for a reported 30 percent of global titanium production.[80] Several lost out to Mittal Steel in its bid to acquire Arcelor, but in view of the global trend towards consolidation in the steel sector, further deals involving Russian entities must be expected. Consolidation is also occurring in the aluminum sector as demonstrated by the three-way merger (announced in 2006 but to be completed in 2007) combining aluminum assets of RUSAL, SUAL, and Glencore International A.G. to create what is likely to be the world's largest aluminum producer.[81]

75. *Polish Fuel Concern Finalizes Takeover of Lithuanian Refinery*, People's Daily Online, http://english.peopledaily.com.cn/200612/18/eng20061218_333512.html (last visited Mar. 11, 2007).

76. *Polish Bank Watchdog Approves BPH-Pekao Merger*, EU Business, Apr. 5, 2006, *available at* http://www.eubusiness.com/Finance/060405175152.s4e6t9vz.

77. *Poland, UniCredit Sign Deal to End Merger Row*, EU Business, Apr. 5, 2006, *available at* http://www.eubusiness.com/Finance/060405095630.ygdc5aov.

78. University of Alberta Online, Sinopec Completes Deal to Buy 99.49% of Udmurtneft Ordinary Shares (Aug. 28, 2006), http://www.uofaweb.ualberta.ca/chinainstitute/nav03.cfm?nav03=49650&nav02=43661&nav01=43092.

79. *Id.*

80. *Rosoboronexport Buys 41% in Titanium Co. Vsmpo-Avisma*, RIA Novosti, Sept. 12, 2006, http://en.rian.ru/business/20060912/53781455.html.

81. Press Release, SAUL Group, RUSAL, SUAL and GLENCORE Create World's Leading Aluminium Company, (Oct. 9, 2006), *available at* http://www.sual.com/news/?id=444.

B. Key Legal Developments

Perhaps the key legislative change in terms of M&A is the introduction of a new mandatory offer procedure. This requires an offer to the holders of all outstanding voting shares in circumstances where a shareholder acquires more than 30 percent of voting shares.[82] The form of the mandatory offer is closely prescribed.

A squeeze-out procedure has also been introduced allowing a 95 percent majority shareholder to purchase the shares of the minority shareholders (provided that the 95 percent holding was acquired in a specified way).[83]

In relation to merger clearance, a new federal antimonopoly law[84] has significantly reduced the triggering thresholds and introduced some new procedures (removing the need for pre-completion approval in certain circumstances). Also likely to aid the implementation of acquisitions is the simplification of certain banking procedures. In particular, the Russian Central Bank has cancelled the obligation to use specialized accounts for a number of operations with foreign currency (including payments for shares) and will lose the right to re-introduce such procedures from January 1, 2007.[85]

As to the key energy sector, amendments have been introduced to the existing subsoil law, introducing a procedure for the transfer (not previously permitted) of subsoil licenses from a subsidiary to its parent company and from one sister company to another.[86] In relation to gas, federal law now provides that OAO Gazprom has the exclusive right to export gas.[87]

The electricity sector saw new rules for wholesale[88] and retail[89] power markets introduced in August, which abolished the regulated wholesale market and provided for a system of regulated price contracts.

XII. Switzerland

In 2006, except for the tax law (which will be referred to below), there were no significant formal changes in the M&A law. There were, however, some remarkable developments in corporate law. A comprehensive revision of the law of the limited liability

82. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 7-FZ, Jan. 5, 2006, art. 84.2(1), *translated in* Econ. L. of Russia, 12044133 (Garant-Serv., 2007); Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 146-FZ, July 27, 2006, *translated in* Econ. L. of Russia, 12048568 (Garant-Serv., 2007).

83. No. 7-FZ, *supra* note 82.

84. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 135-FZ, July 26, 2006, arts. 27 & 30, *translated in* Econ. L. of Russia, 12047719 (Garant-Serv., 2007).

85. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 1688-U, May 29, 2006, *translated in* Econ. L. of Russia, 12047719 (Garant-Serv., 2007).

86. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 173-FZ, Oct. 25, 2006.

87. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 117-FZ, July 28, 2006, *translated in* Econ. L. of Russia, 12048416 (Garant-Serv. 2007).

88. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 529, Aug. 31, 2006, *translated in* Econ. L. of Russia, 89916 (Garant-Serv., 2007).

89. Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2005, No. 530, *translated in* Econ. L. of Russia ,12041667 (Garant-Serv., 2007).

corporation was initiated late in 2005,[90] and on January 1, 2007, a new law requiring disclosure of listed companies' managers' salaries will come into force.[91]

The Swiss Takeover Board was also quite active.[92] The Takeover Board is the competent authority in Switzerland to issue so-called suggestions and decisions in case of takeovers involving listed companies in which public offers to buy all shares must be made. In one of its more recent suggestions, it stated that the target company must treat all bidders equally (including potential competitors) and has to supply ample information to the Takeover Board.[93] Basically, the Takeover Board requested the same information as received by bidders.

The parliament has enacted the Federal Statute on Urgent Amendments to Company Taxation,[94] which will become effective partly on January 1, 2007, and partly on January 2008. The federal tax administration will publish a circular letter in December 2006 that will specify the new rules.

XIII. United Kingdom

A. THE COMPANIES ACT 2006

The Companies Bill received the Royal Assent and became the Companies Act 2006 (the 2006 Act) on November 8, 2006.[95] The 2006 Act consolidates all previous companies legislation and will replace (with a very few minor exceptions) the Companies Act 1985 in its entirety.

The provisions on shareholder communication,[96] and in particular the electronic communications provisions,[97] were brought into force in January 2007, at the same time as the provisions implementing the EU Takeovers Directive and the EU Transparency Directive.[98] The remainder of the 2006 Act will be brought into force by October 2008.[99]

The 2006 Act's impact on the rules on financial assistance and directors' duties are of particular interest to M&A practitioners.

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90. Notice on the revision was first published in Bundesblatt [BBl] 7029 (2005), *available at* http://www.admin.ch/ch/d/ff/2005/7029.pdf.

91. Botschaft zur Änderung des Obligationenrechts, June 23, 2004, Bundesblatt [BBl] 4471 (2004), *available at* http://www.admin.ch/ch/d/ff/2004/4471.pdf. *See* Schweizerisches Obligationenrecht [Code of Obligations], art. 663b -664 (Switz.).

92. Übernahmekommission [Swiss Takeover Board], News, http://www.takeover.ch/alctuelles.html?&L=3 (follow "News" hyperlink) (last visited Feb. 21, 2007).

93. Übernahmekommission [Swiss Takeover Board], Empfehlung III SIG Holding AG, Nov. 14, 2006, *available at* http://www.takeover.ch/37.html?&L=3&cHash=99bcb27abb&tx_bumadvice_pi1[uid]=402&tx_bumadvice_pi1[view]=detail.

94. At presstime, the text and the official number of the law were not yet available on the administration's website.

95. Companies Act, 2006, c. 46 (Eng.), *available at* http://www.opsi.gov.uk/ACTS/acts2006/ukpga_20060046_en.pdf [hereinafter 2006 Act].

96. *Id.* §§ 1143-48.

97. *Id.* at sched. 5, pt. 3 (dealing with communications in electronic forms).

98. *Id.* §§ 1265-73.

99. U.K. DEP'T OF TRADE INDUS., COMPANIES ACT 2006: BRIEFING ON FIRST COMMENCEMENT ORDER AND REGULATIONS IMPLEMENTING FIRST COMPANY LAW AMENDMENT DIRECTIVE (2007), *Available At* Http://www.Dti.Gov.Uk/Files/File36201.Doc.

1. *Financial Assistance*

The 2006 Act abolishes the prohibition on the giving of financial assistance by private companies and their subsidiaries for the purpose of acquiring shares in that company.[100] In accordance with the Second Company Law Directive (77/91/EEC),[101] the prohibition on giving financial assistance will be retained for public companies under the 2006 Act.[102] The new rules on financial assistance have been broadly welcomed.

An EU Directive amending the Second Company Law Directive was formally adopted and published this year.[103] The new Directive states that public companies will be able to provide financial assistance if certain conditions are met.[104]

2. *Directors' Duties*

The 2006 Act codifies the common law and equitable principles that presently govern the duties owed by directors to their companies.[105] While some of the seven codified duties set out in the 2006 Act are relatively uncontroversial, others have been criticized.

Although the 2006 Act provides that the new statutory duties shall have effect in place of directors' common law and equitable duties, regard must be had to the common law and equitable rules and principles in interpreting and applying the statutory duties.[106]

B. EU Takeovers Directive

The EU Takeovers Directive[107] was implemented in the United Kingdom on May 20, 2006.[108] The implementation of the Takeovers Directive has led to some substantive changes to the current regulatory system in the United Kingdom. The regulations place the Panel on Takeovers and Mergers on a statutory footing for the first time, giving the Panel powers to make rules on takeovers, introduce a new criminal offence for breach of the takeover documentation requirements, and make changes to the squeeze-out procedures on bids.[109]

C. The Merger Regulation and Changes to Regulatory Practice

In 2006, the Office of Fair Trading (OFT) announced various changes to its procedures and fees. The test for referral of transactions to the Competition Commission was lowered, and we have seen a significant increase in the OFT's referrals to the Competition Commission for detailed investigation. The OFT now routinely requests a wide variety of

100. 2006 Act, *supra* note 95, at pt. 18.
101. Council Directive 77/91/EEC, 1977 O.J. (L 26) 1.
102. *Id.*
103. Council Directive 2006/68/EC, 2006 O.J. (L 264) 32.
104. *Id.* at art. 1(6).
105. 2006 Act, *supra* note 95, at pt. 10, c. 7.
106. *Id.* at c. 2, § 178.
107. Takeovers Directive, *supra* note 69.
108. Memorandum from the U.K. Dep't of Trade and Indus. to the House of Lords Select Comm. on the Merits of Statutory Instruments and the Joint Comm. on Statutory Instruments (May 2, 2006), *available at* http://www.opsi.gov.uk/si/em2006/uksiem_20061183_en.pdf.
109. *Id.* at 21-24; 27-28.

documents from the parties to a merger that qualifies for investigation under U.K. merger control laws, regardless of whether any application for merger clearance is made. The new documentary requirements are more onerous than those previously imposed.

The OFT announced on April 6, 2006, that it will consider applications for informal advice on confidential transactions where there is a good faith intention to proceed and where the OFT's duty to refer to the Competition Commission is a genuine issue.[110]

As of April 6, 2006, there was a three-fold increase in the fees payable for consideration of a merger by the OFT. Foreign acquirers will be charged a fee for the first time from April 2006.

D. Recent M&A Trends and Deals

The U.K. market has seen a marked increase in takeover offers for U.K. targets by foreign companies. Hostile takeovers, such as the takeover of BAA P.L.C. by Grupo Ferrovial S.A.,[111] have also been a key feature of U.K. M&A activity in 2006.

XIV. United States[112]

The year 2006 was an exceptionally strong one for M&A activity in the United States, with the highest level of announced M&A activity since 2000. Announced U.S. M&A volume in 2006 exceeded $1.5 trillion, a 35 percent increase over the prior year.[113] In addition, the final quarter of 2006 was particularly strong with close to $500 billion worth of deals announced in the quarter.[114]

The flow of mega-mergers continued, with the $20 billion deal becoming ever more commonplace. Through the third quarter of 2006, the twenty largest deals accounted for over 22 percent of overall M&A volume. Marquee transactions include: AT&T's pending purchase of BellSouth (valued at over $80 billion),[115] Wachovia's completed purchase of Golden West Financial Corp. for $23.91 billion,[116] and a planned $23 billion merger of equals between Caremark and CVS Corp.[117] In addition, real estate investment trusts (REITs) have played an important role in the M&A surge, with eighteen REITs announcing or completing transactions in 2006, including to date the largest ever private equity

110. U.K. Office of Fair Trading, Interim Arrangements for Informal Advice and Pre-Notification Contacts 3-4 (2006), http://www.oft.gov.uk/NR/rdonlyres/EDA33A6E-29FC-45F3-930B-3643C9A78344/0/informal.pdf.

111. *BAA Agrees to Ferrovial Takeover*, BBC News, http://news.bbc.co.uk/1/hi/business/5050932.stm (last visited Mar. 12, 2007).

112. Information in this section comes from many original sources. To aid readers around the world who may desire additional background information or context, the editors have added citations to newspaper reports that may be helpful to some readers.

113. *See* Thomson Financial, Mergers and Acquisitions Review: Fourth Quarter 2006 (2006), *available at* http://www.thomsonfinancial.co.jp/pdf/060104%20M&A%20Review%204Q06.pdf.

114. *See id.*

115. Amy Schatz, *AT&T, BellSouth Expected to Clear Merger Review*, Wall St. J. (E. ed.), Oct. 11, 2006, at A10.

116. *Wachovia Corp.: Integration Process Continues*, Wall St. J., (E. ed.), Oct. 3, 2006, at A12.

117. Dennis K. Berman, William M. Bulkeley & Scott Hensley, *Higher Bid Lifts Caremark, for Now; Express Scripts' Rival Offer To CVS's Draws Cheers, But Antitrust Issues Loom*, Wall St. J. (E. ed.), Dec. 19, 2006, at A2.

deal, Blackstone's $36 billion acquisition of Equity Office Properties Trust,[118] and the first successful hostile takeover of a REIT, Public Storage's $3.2 billion acquisition of Shurgard.[119] Some of the significant developments seen in U.S. M&A activity are outlined below.

A. Private Equity

Private equity firms continued to provide much of the fuel for M&A activity in 2006, being involved in five of the year's ten largest U.S. M&A deals to date.[120] Multiple deals jockeyed to set the record for largest private equity buyout (previously set by the $29 billion RJR Nabisco transaction in 1988), including the $36 billion acquisition by the Blackstone Group of Equity Office Properties Trust referred to above and the $23.1 billion acquisition of HCA Inc. by a private equity consortium.[121] In fact, seventeen of the twenty largest leveraged buyout (LBO) deals of all time have been announced in the past eighteen months. In addition, private equity funds raised $215.4 billion in 2006, breaking the fund-raising record they set in 2000 ($178 billion)[122] and suggesting that the abundance of private equity capital and, therefore, private equity-driven deals, is unlikely to end anytime soon.

These significant transactions are largely made possible by the continued popularity of consortium or club deals, which combine private equity participants (and, in some cases, strategic players) in an acquisition group. The ability of club deals to undertake deals of ever-increasing size challenges conventional wisdom that some companies are simply too big to be taken over by private equity firms.

However, the club deal trend has recently come under scrutiny. In October 2006, the antitrust division of the Justice Department launched a preliminary investigation into private equity firms' auction practices since 2003, sending inquiries to a number of leading private equity firms. Following suit, a month later shareholders of several companies that had recently been acquired (or agreed to be acquired) in very significant club deals filed a class action lawsuit in federal court against fourteen private equity firms alleging collusion among the buyout firms. Specifically, the complaint alleged that the many leading private equity firms named in the suit violated antitrust laws by conspiring to fix deal prices. The gravamen of the complaint is that had the private equity firms not allegedly colluded, the selling companies could have achieved a higher price through a larger number of bidders.

118. Dennis K. Berman, Jennifer S. Forsyth, & Ryan Chittum, *Blackstone Reaches Pact to Buy REIT on a Banner Day for Deals; Proposed $20 Billion Buyout of Big Office Landlord Brings Tally to $52 Billion*, Wall St. J. (E. ed.), Nov. 20, 2006, at A1.

119. Property Brief, *Public Storage Inc.: Deal Is Reached to Acquire Shurgard for $3.2 Billion*, Wall St. J. (E. ed.), Mar. 8, 2006, at A19.

120. *See* Dennis K. Berman, *Year-End Review of Markets & Finance 2006; Can M&A's 'Best of Times' Get Better?; Private Equity Fuels A Frenzy of Deals; Cash on Sidelines*, Wall St. J. (E. ed.), Jan. 2, 2007, at R5.

121. Healthcare Brief, *HCA Inc.: Shareholders Approve Buyout For $21.3 Billion by Consortium*, Wall St. J. (E. ed.), Nov. 17, 2006, A13.

122. *See* Stephen Taub, *Record Year for Private Equity Fundraising*, CFO.com, Jan.11, 2007, http://www.cfo.com/article.cfm/8537972?f=search.

B. The Impact of Corporate Governance and Shareholder Activism

Shareholder activism has continued to grow both in volume and influence. The press and proxy advisory firms have played a growing role in mobilizing and influencing shareholder action. The year 2006 saw an increase in the number of shareholder proposals, campaigns to withhold votes from director nominees, submission of binding bylaws, and extensive amounts of public criticism.

More and more, a number of activists and proxy advisory firms are equating "good governance" with the dismantling or lack of takeover defenses, while shareholder deference to board judgment on transactions appears to be dissipating to some extent. Consequently, a number of companies, either under pressure from shareholders or in an attempt to anticipate future action, have eliminated or not renewed shareholder rights plans and have eliminated staggered or classified boards and other takeover defenses.

At the same time, various changes have been adopted or proposed to allow shareholders greater power through the voting and proxy process. Recent trends show increased numbers of companies adopting majority (as opposed to plurality) voting in director elections. In October 2006, the New York Stock Exchange proposed a rule that would eliminate broker discretionary voting in director elections,[123] creating the potential for a significant shift of voting power from brokers (who have traditionally voted in line with the company's recommendations and director nominees when instructions from clients for whose accounts the shares are held are not received) to institutional investors (and, by extension, to the proxy advisory services).

With similar potential to change elections and proxy fights, the Securities and Exchange Commission (SEC) plans to review various proxy rules in the upcoming year. After a federal court ruling in September 2006 reopened the possibility of shareholder proxy access (agreeing with an interpretation of SEC rules that would make it easier for shareholders to nominate their own director candidates and have such candidates included in the company's own proxy statement),[124] the SEC promised a regulatory response in time for the 2007 proxy season. However, the SEC now has postponed twice its consideration of this issue, and whether a rule clarification restoring the status quo or a change leading to proxy access reform eventually results remains to be seen. The SEC did take action on another proxy rule proposal at their December meeting, however, reviewing and subsequently adopting a proposal for the electronic filing of proxy statements,[125] which will significantly decrease dissidents' cost burdens in running a proxy fight. All these changes create the potential for more proxy fights and hostile activity going forward.

C. Activist Hedge Funds

Hedge funds continue to play an important role in today's M&A environment, often leading the charge in this era of heightened shareholder activism. Undertaking sophisti-

123. *See* New York Stock Exchange, Inc, Form 19b—Proposed Rule Change by New York Stock Exchange (Oct. 24, 2006), *available at* http://apps.nyse.com/commdata/pub19b4.nsf/docs/A2CC4C6807081506852572 1100589E90/$FILE/NYSE-2006-92.pdf.

124. *See* Am. Fed'n of State, County & Mun. Employees v. Am. Int'l Group, Inc., 462 F.3d 121 (2d. Cir. 2006).

125. *See* Internet Availability of Proxy Materials, Exchange Act Release No. 34-55146, 17 C.F.R. 240 (Jan. 22, 2007), *available at* http://www.sec.gov/rules/final/2007/34-55146.pdf.

cated reviews of companies' strengths and weaknesses, making so-called strategic recommendations, and showing an increased willingness to pursue aggressive tactics, activist hedge funds are playing a pronounced role in the market. Hedge funds have pressured companies into a wide range of actions in 2006 including: (i) share buybacks and sales of assets (including Pershing Square's interventions at McDonald's[126] and Wendy's[127] and Carl Icahn's actions at Time Warner[128]); (ii) sale of the company (such as the pressure initiated by Private Capital Management on Knight-Ridder to put itself up for sale[129]); (iii) blocking M&A transactions (such as hedge funds opposing Novartis' buyout of Chiron as inadequate until the price was raised twice[130]); and (iv) even seeking to acquire companies themselves (such as Jana Partner's offer for Houston Exploration[131] and Carl Icahn's teaming up with privately held Macklowe Properties in a late-year bid for Reckson Associates, which has already agreed to be acquired by SL Green[132]).

The increase in hedge fund activism has been fueled by an increase in capital and market weight. In 2006, hedge funds held an estimated $1.2 to $1.6 trillion in assets, compared to $38 billion in assets in 1990.[133] In addition, the Pension Plan Protection Act of 2006 relaxed pension plan asset regulations in a manner that may make it easier for hedge funds to grow by being able to attract more capital from benefit plan investors.[134]

As hedge funds continue to grow exponentially and become louder activists, calls for their regulation have increased. However, hedge funds are exempt from SEC oversight under the Investment Company Act of 1940, and earlier this year the SEC's initial attempt at regulation failed when a federal court in Washington, D.C., vacated new SEC rules requiring registration of hedge funds.[135] The SEC has continued to look into methods to increase hedge fund transparency, including various actual and beneficial ownership and disclosure issues.

D. Amendments to the "Best Price" Rule

In late 2006, the SEC modified the so-called tender offer "best price" rule,[136] which requires that the price paid to any shareholder for shares tendered into a tender offer is the highest price paid to any other shareholder for shares tendered in the offer. The amendments clarify that consideration paid to persons who are shareholders but paid pur-

126. Steven Gray, *McDonald's Gets Ackman Truce After Sale Plan*, Wall St. J. (E. ed.), Jan. 26, 2006, at B3.

127. Marietta Cauchi, *Activist Holders Tap Investment Banks*, Wall St. J. (E. ed.), Apr. 12, 2006.

128. Matthew Karnitschnig, *Stock Buyback Will Raise Debt of Time Warner*, Wall St. J. (E. ed.), Feb. 21, 2006, at A3.

129. Joseph T. Hallinan & Dennis K. Berman, *Knight Ridder Nears Sale to McClatchy for $4.5 Billion in Cash, Stock*, Wall St. J. (E. ed.), Mar 13, 2006, at A2.

130. Chris Young, *Hedge Funds to the Rescue*, Bus. Week, July 31, 2006, at 86.

131. *Houston Exploration*, Fin. Times (London), Jan. 9, 2007, at 16.

132. Jennifer S. Forsyth, *SL Green Wins Approval of Reckson Shareholders*, Wall St. J. (E. ed.), Dec. 8, 2006, at C3; Dennis K. Berman, *Icahn, Macklowe to Bid for Reckson; Offer Pegged at $4.6 Billion Would Exceed Value of Deal Made With SL Green Realty*, Wall St. J. (E. ed.), Nov. 16, 2006, at A3.

133. *See generally* Sebastian Mallaby, *Hands Off Hedge Funds*, 86 Foreign Aff. 91 (2007).

134. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780.

135. *See* Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006). *See also* James Altucher, *No Place to Hide in an Age of Transparency*, Fin. Times (London), Nov. 7, 2006 at 11.

136. *See* Amendments to the Tender Offer Best-Price Rules, Exchange Release No. 34-54684, 17 C.F.R. 200, 240 (Nov. 1, 2006), *available at* http://www.sec.gov/rules/final/2006/34-54684.pdf.

suant to employment, severance, or other employee benefit arrangements that meet specific requirements do not constitute consideration paid for tendered shares under the "best price" rule. These amendments should help alleviate much concern with respect to structuring transactions as tender offers (which, in many cases, can be consummated more quickly than a one-step merger) and may lead to an increased number of acquisitions being structured as tender offers.

XV. Venezuela

On July 20, 2006, the Venezuelan Supreme Court's Constitutional Chamber published a decision establishing a new mandatory interpretation of several articles of the Venezuelan Commercial Code related to the protection of minority shareholders' rights in closely held stock corporations.[137]

In January 2006, the Venezuelan company Telvenco and the Italian company Telecom Italia Mobile S.P.A. (TIM) reached a US$425 million agreement for the acquisition of the Venezuelan cell phone operator DIGITEL by Telvenco.[138] The Venezuelan telecoms regulator (CONATEL) approved the acquisition.

Further, Mexican companies Telmex Corp., S.A. and America Móvil, S.A. de C.V. announced the acquisition of Verizon Communication's assets in Latin America.[139] The business involves operations in the Dominican Republic, Puerto Rico, and Venezuela. In Venezuela, the acquisition includes a stake in CANTV (Compañía Anónima Nacional Teléfonos de Venezuela) through a partnership between Telmex Corp., S.A. and America Móvil, S.A. de C.V.[140]

137. Tribunal Supremo de Justicia, Sala Constitucional [TSJ] [Supreme Court, Constitutional Chamber], July 20, 2006 (Venez.), *available at* http://www.tsj.gov.ve/deciones/scon/Julio/1420-200706-05-2397.htm.

138. Press Release, Telecom Italia Group, THE OPERATION WILL PERMIT A REDUCTION OF GROUP DEBT OF APPROXIMATELY $425 MILLION (JULY 19, 2006), *available at* http://www.telecomitalia.it/cgi-bin/tiportale/TIPortale/ep/contentView.do?channelId=-97938LANG=EN&contentId=38pageTypeId=-8663&contentType=EDITORIAL.

139. Vikas Bajaj, *Verizon to Sell Off Latin American Units*, INT'L HERALD TRIB. Apr. 4, 2006, at F16, *available at* http://www.iht.com/articles/2006/04/03/business/verizon.php.

140. *Id.*